

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Reissue of:

Sanchez et al.

Patent No.: 5,635,235

Date of Patent: June 3, 1997

Serial No.: 09/753,171

Filed: December 29, 2000

For: METHODS FOR HANDLING MASA

Examiner: Arthur L. Corbin

Group Art Unit: 1761

Irvine, California

APPEAL BRIEF

Assistant Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

In accordance with the Notice of Appeal filed on November 21, 2002, appellant respectfully submits statements and arguments required by 37 CFR §1.192. The present appeal brief is submitted in triplicate. The requisite fee under 37 CFR §1.17(c) is submitted, herewith, to include a one-month extension of time. If necessary, please charge Deposit Account No. 01-1960.

I. STATEMENT OF REAL PARTY IN INTEREST

Assignee Casa Herrera, Inc. is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

No related Appeals or Interferences are pending.

III. STATUS OF CLAIMS

Claims 38-57, are pending in this application. Claims 38-57 are finally rejected and claims 38-57 are appealed.

IV. STATUS OF AMENDMENTS

Claims 1-37 have been cancelled. Amendments to claims 38-57 have been entered.

V. SUMMARY OF INVENTION

"Masa" is a term that generally describes flour dough used to make tortillas. The present invention is directed to a masa handling system that has the following features: the safe separation of the masa into the individual logs; the automatic distribution of those logs to the masa hoppers requiring resupply; the automatic removal of gas bubbles from the masa within the masa hoppers; and the prevention of the masa curtain from becoming stuck to the primary rollers. The masa handling system of the invention is for use in conjunction with commonly available food processing equipment, such as an oven and cooling apparatus for the commercial processing of masa.

The masa processing equipment typically has a mixer and an adjacent extruder which produces a generally continuous stream of masa to the handling system of the invention. The masa is processed according to the invention and is ultimately fed into a pair of counter-rotating sheeting rollers which compress the masa into a final thickness.

The masa handling system includes at least two masa hoppers and at least two endless belt feed conveyors which have upper surfaces that move in the same direction. The feed conveyors are arranged in upstream and downstream positions relative to each other. The upstream feed conveyor extends from the output end of the masa chamber, defined by the opposed, aligned separator conveyors of the masa separator, and receive the masa logs. The upstream feed conveyor extends to a point generally above one of the masa hoppers. The downstream feed conveyor extends from a position spaced from the upstream conveyor to a point generally above another of the masa hoppers.

The masa handling system also has a diverter gate that is positioned between the feed conveyors. The diverter gate selectively moves between a first position and a second position. When the diverter gate is in the first position, the masa logs are guided from the upstream feed conveyor to the downstream feed conveyor. When the diverter gate is in the second position, the masa logs are guided into the masa hopper.

The masa handling system also has a sensor associated with each masa hopper for the sensing of the level of masa therein. The sensor creates a signal which changes its state when the level of masa in the associated masa hopper is below a predetermined level. A mechanism is connected to each diverter gate and is responsive to the signal from the sensor. The mechanism moves the diverter gate from the first position to the second position when the level of masa in the one masa hopper

is sensed to be below the predetermined level. The mechanism returns the diverter gate to the first position when the level of masa in the one masa hopper is sensed to be above a predetermined level.

The masa hoppers are self feeding and each has an opening positioned for receiving masa from its associated feed conveyor. Each masa hopper also has a gravity feeder with side walls and a bottom wall cooperating to define a space for the placement of the masa to be fed to the sheeter rollers. One or more rotating shafts are mounted within the gravity feeder. Each shaft has projections which remove gas bubbles from the masa and force the masa towards the sheeter rollers. The bottom wall of the gravity feeder extends from the side walls and defines a slot which the masa passes through, towards the sheeter rollers.

The foregoing structural arrangement of the invention provides several important advantages. Chief among them is the safe separation of the masa stream into masa logs without the use of a potentially dangerous pneumatic blade. Another advantage associated with the invention is the automatic distribution of the masa logs into the individual masa hoppers without the cost of human labor. Yet another advantage with the invention is the automatic removal of gas bubbles from the masa within the masa hoppers also without the cost of human labor.

VI. PROCEDURAL SUMMARY

On June 3, 1997, the Patent Office issued the applicants' patent no. 5,635,235. On June 3, 1999, the applicants filed a parent reissue application. In support of the parent application, each of the three inventors signed a Reissue Application Declaration

(form PTO/SB/51). As provide by the PTO's form, the inventors broadly stated by checking the appropriate box that:

I verily believe the original patent to be wholly or partly inoperative or invalid, for the reason described below. (check all boxes that apply):

/X/ by reason of the patentee claiming more or less than he had the right to claim in the patent.

The Reissue Application Declaration (form PTO/SB/51) also invited the inventors to describe "at least one error upon which reissue is based." (emphasis added) In that section, as requested, the inventors noted that:

The claims directed to a "Diverter Gate" are too narrow.

As required by 35 U.S.C. 251, therefore, the patentee notified the public within two years of the patent's issuance that it sought to broaden the claims of its patent.

On December 29, 2000, during the co-pendency of the parent application, the patentee filed a continuation reissue application to broaden other claims because it determined that it had claimed "less than it had the right to claim in the patent" in respect to areas other than as to the diverter gate. In particular, some of the claims required a hopper with a pair of side walls and a bottom wall since, and an infringer was asserting that its product does not infringe because it included a hopper that was created with a pair of slanted side walls and no bottom wall.

On December 29, 2000, the applicants could have simply continued to prosecute the parent application by filing a Continued Prosecution Application (CPA). In such case, the parent application's declarations would obviously have been compliant with 37 CFR 1.175(a)(1). Instead, however, the patentee elected file a continuation application

so that the parent application could issue without delay. On January 2, 2001, the parent application matured into Reissue Patent RE37,008.

As a result of that purely procedural step of choosing to issue the parent while filing a continuation, the Examiner is now asserting that the parent application's declarations are inadequate for use in the continuation application and that, regardless of the resolution of that issue, that the continuation application is a "separate" reissue application and that 35 USC 251 prohibits claims from being broadened in a reissue application filed outside the two-year statutory period.

The Final Office Action dated May 21, 2002 contends that this continuation application is defective because the error relied on to support this continuation application does not comply with 37 CFR 1.175(a)(1). The first paragraph then refers applicant to the previous Office Action, where the Examiner contends that:

The error identified in the reissue declaration applies only to the parent reissue. A different error that applicant relies upon to support the instant continuation reissue application must be identified in a supplemental reissue declaration.

The prior Office Action, in other words, asserts that the continuation application cannot rely on the parent application because the error identified in the parent application's declarations is different that the error being addressed in this continuation application.

Applicants respectfully traverse.

VII. ISSUES

A. Whether a parent reissue application's declarations are defective for use in a continuation reissue application, where the parent declaration properly put the public on notice of broadening claims, however where the continuation reissue seeks to broaden claims based on a different error than noted in the parent declaration.

B. Whether a continuation reissue application is a "separate" application and therefore prohibited from broadening claims if filed outside the two-year statutory period.

VIII. ARGUMENTS

As to Issue A, the Examiner contends that a parent reissue application declarations are defective for use in a continuation reissue application under 37 CFR §1.175 (a)(1), where the continuation reissue application seeks to broaden claims based on a different error than the "at least one" example noted in the parent declaration. 37 CFR §1.175 (a)(1) requires that a reissue oath or declaration in addition to complying with the requirements of §1.63, must also state that the patent is wholly or partly invalid by reason of a defective specification or drawing or:

by reason of the patentee claiming more or less than the patentee had the right to claim in the patent, stating at least one error being relied upon as the basis for reissue.

As invited by the PTO's own form, Reissue Application Declaration (form PTO/SB/51), each inventor broadly stated by checking the appropriate box that:

I verily believe the original patent to be wholly or partly inoperative or invalid, for the reason described below. (check all boxes that apply):

/X/ by reason of the patentee claiming more or less than he had the right to claim in the patent.

The Reissue Application Declaration also invited the inventors to describe "at least one error upon which reissue is based." (emphasis added) In that section, as requested, the inventors noted that:

The claims directed to a "Diverter Gate" are too narrow.

Claims at issue in this continuation application could have been supported by these broad declarations had the patentee added them to the parent application. This is the law as set forth in In re Doll.¹ In that case, the applicant presented broadening reissue claims 20-31 prior to the two-year period, submitting a supporting reissue declaration that stated that:

None of the patent claims afford for the embodiment of Fig. 4 patent coverage of the scope possessed by claims 20-31, inclusive, which form part of the foregoing specification, nor were claims of comparable scope ever presented during the pendency of the original application on which said Letter Patent were granted.²

Later, after more than two-years had passed since the patent issued, the appellant added even **broader** claims, not once, but twice. Like the Examiner here, the Patent Office contended that the applicant's reissue oath was defective. The CCPA held, however, that even though the later filed reissue application claims were even broader than the first-filed reissue application claims 20-31, the ones explicitly referenced in the reissue declaration, the reissue declaration was sufficient to support all of the reissue application claims. Referring to the two year statutory period as set forth in 35 U.S.C. §251(4), the CCPA stated that "it appears clear that the language 'applied for' refers to filing of [the reissue] application [and not to the submission date of

¹ 419 F.2d 925, 164 USPQ 218 (CCPA 1970).

² In re Doll, at 220.

the later added claims].”³ In In re Graff, the Federal Circuit discusses In re Doll. It notes that because “the public was placed on notice of the patentee’s intention to enlarge the claim by the filing of a broadening reissue application within the two year statutory period. The court in Doll simply held that the reissue applicant, in the course of prosecution of the reissue application, was not barred from making further broadening in the claims.”⁴ Therefore, additional broadening outside the two-year limit is appropriate as long as some broadening occurred within the two-year period.⁵ It is clear that the original reissue declaration met the objective of public notice of broadening reissue claims.

The only difference between this case and In re Doll is that instead of an application that is prosecuted for a long time with different claims added along the way, a continuation reissue application was properly filed and claimed priority to an earlier-filed reissue application under 35 U.S.C. §120. This is purely a procedural choice of the patentee does not affect the legal rights of the patentee. In fact, 35 U.S.C. §251(2) specifically authorizes the Commissioner to issue several reissue patents. The Federal Circuit discusses §251(2) as “plainly intended as enabling, not limiting. Section 251(2) has the effect of assuring that a different burden is not placed on divisional or continuation reissue applications, compared with divisions and continuations of original applications, by codifying the Supreme Court decision which recognized that more than one patent can result from a reissue proceeding.”⁶

³ 419 F.2d at 928, 164 U.S.P.Q. at 220.

⁴ In Re Graff, 111 F.3d 874, 877 (Fed. Cir. 1997).

⁵ 62 FR 53132, 53154, citing In re Doll, 419 F.2d 925.

⁶ In re Graff, 111 F.3d at 877.

The Examiner contends that a continuing chain of reissue applications is contrary to the strong public policy intended to be enforced by 35 U.S.C. §251(4). To the contrary, the patentee respectfully asserts that in light of In re Doll, 35 U.S.C. §251(2), and In re Paul Graff, the law plainly allows a continuing chain of reissue applications so long as the first is filed within two years since the public policy behind the two-year statutory period is simply to place the public on notice within two years that broadening claims are being sought.

The Examiner also argues that the continuing reissue application broadens claims based on "new facts" that takes advantage of the "fortuitous" filing of the parent reissue application. However, it is clear from the forgoing discussion, that factual "what ifs," are not legal arguments that change the requirements that: continuation reissue applications are not more burdened than a continuation of an original application; and additional broadening outside the two-year limit is appropriate as long as some broadening occurred within the two-year period.

Regarding Issue B, as stated above In re Graff makes clear that continuation reissue application is not a "separate" application. A continuation reissue application like a continuation from an original application is controlled by 35 USC §120 that provides in relevant part that:

An application for patent *** which is filed by an inventor or inventors named in the previously filed application shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application *** if it contains or is amended to contain a specific reference to the earlier filed application.

Therefore, a continuation reissue application, just like a continuation application, is not legally "separate" from its parent application.


IX. CONCLUSION

As discussed above, the Examiner's rejection is premised on the misunderstanding that the facts here are distinguishable from In re Doll because here there is a continuation reissue application. However, In re Doll holds that a reissue oath is not defective when relied on for additional broadening outside two years as long as some broadening occurred within two years; and In re Graff holds that section 251(2) assures that no different burden is placed on a continuation reissue application compared with a continuation of an original application. Accordingly, it is respectfully requested that the Examiner's Final Action rejecting claims 38-57 be reversed.

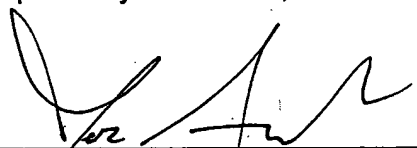
I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: **Box Reissue, Assistant Commissioner for Patents, Washington, DC 20231** on

February 11, 2003

By Angela Williams


Signature
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Respectfully submitted,



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APPENDIX

APPENDIX A

CLAIMS INVOLVED IN THE APPEAL

38. (Amended) A method for feeding masa to a pair of aligned, opposed sheeter rollers, the sheeter rollers located adjacent to a masa hopper having an opening for receiving masa and a slot for dispensing masa, the masa hopper also having at least one shaft above the slot, each shaft having a projection, the method comprising the steps of:

placing the masa through the opening in the masa hopper;

feeding the masa to at least one shaft; and

forcing the masa through the slot, toward the sheeter rollers, with the projection on at least one shaft.

39. The method for feeding masa defined in Claim 38 comprising the further step of removing gas bubbles from the masa with the projection on at least one shaft.

40. The method for feeding masa as defined in Claim 38, wherein said feeding is accomplished by gravity.

41. (Amended) The method for feeding masa as defined in Claim 38, wherein said forcing is accomplished by rotating the shaft with a motor.

42. (Amended) The method for feeding masa as defined in claim 38, wherein the masa hopper also has a pair of opposed, horizontally aligned, primary rollers between the slot and the sheeter rollers, the primary rollers each having a generally cylindrical surface and two ends, the method further comprising the steps of:

- rotating the primary rollers;
- drawing the masa between the primary rollers;
- compressing the masa into a generally uniform curtain; and
- feeding said uniform curtain into the sheeter rollers.

43. The method for feeding masa defined in Claim 42, wherein there is a scraper for each primary roller, each scraper having a blade pivotally mounted and biased to longitudinally ride on the lower surface of its associated primary roller, the method further comprising the step of:

- separating masa from the lower surface of each of the primary rollers.

44. (Amended) The method for feeding masa as defined in claim 42, wherein the masa hopper also has two endcaps, each endcap mounted around the ends of the primary rollers, the method further comprising the step of:

- preventing movement of the masa past the ends of the primary rollers.

45. (Amended) A method for feeding masa to a pair of aligned, opposed sheeter rollers, the sheeter rollers located adjacent to a masa hopper having an opening for receiving masa and a slot for dispensing masa, the masa hopper also having at least

one shaft above the slot, each shaft having a projection, the method comprising the steps of:

- placing the masa through the opening in the masa hopper;
- feeding the masa to at least one shaft; and
- removing gas bubbles from the masa with the projection on at least one shaft.

46. The method for feeding masa defined in Claim 45 comprising the further step of forcing the masa through the slot, toward the sheeter rollers, with the projection on at least one shaft.

47. The method for feeding masa as defined in Claim 45, wherein said feeding is accomplished by gravity.

48. (Amended) The method for feeding masa as defined in Claim 45, wherein said forcing is accomplished by rotating the shaft with a motor.

49. (Amended) The method for feeding masa as defined in claim 45, wherein the masa hopper also has a pair of opposed, horizontally aligned, primary rollers between the slot and the sheeter rollers, the primary rollers each having a generally cylindrical surface and two ends, the method further comprising the steps of:

- rotating the primary rollers;
- drawing the masa between the primary rollers;
- compressing the masa into a generally uniform curtain; and
- feeding said uniform curtain into the sheeter rollers.

50. The method for feeding masa defined in Claim 49, wherein there is a scraper for each primary roller, each scraper having a blade pivotally mounted and biased to longitudinally ride on the lower surface of its associated primary roller, the method further comprising the step of:

separating masa from the lower surface of each of the primary rollers.

51. (Amended) The method for feeding masa as defined in claim 49, wherein the masa hopper also has two endcaps, each endcap mounted around the ends of the primary rollers, the method further comprising the step of:

preventing movement of the masa past the ends of the primary rollers.

52. (Amended) A method for feeding masa to a pair of aligned, opposed sheeter rollers, the sheeter rollers located adjacent to a masa hopper having an opening for receiving masa and a slot for dispensing masa, the masa hopper also having at least one shaft above the slot, each shaft having a projection, the method comprising the steps of:

placing the masa through the opening in the masa hopper;

feeding the masa to at least one shaft;

removing gas bubbles from the masa with the projection on at least one shaft;

and

forcing the masa through the slot, toward the sheeter rollers, with the projection on at least one shaft.

53. The method for feeding masa as defined in Claim 52, wherein said feeding is accomplished by gravity.

54. (Amended) The method for feeding masa as defined in Claim 52, wherein said forcing is accomplished by rotating the shaft with a motor.

55. (Amended) The method for feeding masa as defined in claim 52, wherein the masa hopper also has a pair of opposed, horizontally aligned, primary rollers between the slot and the sheeter rollers, the primary rollers each having a generally cylindrical surface and two ends, the method further comprising the steps of:

- rotating the primary rollers;
- drawing the masa between the primary rollers;
- compressing the masa into a generally uniform curtain; and
- feeding said uniform curtain into the sheeter rollers.

56. The method for feeding masa defined in Claim 55, wherein there is a scraper for each primary roller, each scraper having a blade pivotally mounted and biased to longitudinally ride on the lower surface of its associated primary roller, the method further comprising the step of:

- separating masa from the lower surface of each of the primary rollers.

57. (Amended) The method for feeding masa as defined in claim 55, wherein the masa hopper also has two endcaps, each endcap mounted around the ends of the primary rollers, the method further comprising the step of:

preventing movement of the masa past the ends of the primary rollers.